86-1081

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1986

NO. A-80

CHARLES W. EWING and CHARLOTTE A. EWING,

Appellants,

v.

EDGAR L. LINDLEY,
TAX COMMISSIONER OF OHIO,

Appellee.

ON APPEAL FROM THE OHIO SUPREME COURT

JURISDICTION BRIEF

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28 pp

QUESTION PRESENTED

Whether the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution allow a state to impose personal liability on an incompletely defined class of persons namely officers and employees of a corporation for tax obligations of the corporation and not allow members of the class to introduce evidence that they are not at fault.

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JURISDICTIONAL GROUNDS

This is an appeal from a judgment of the Ohio Supreme Court dated May 7, 1986, which upheld the constitutional validity of Ohio Revised Code Sec. 5739.33. Appellants filed their notice of appeal in the Supreme Court of Ohio on June 6, 1986. Jurisdiction of the Court is conferred by 28 USC sec. 1257(2).

STATEMENT OF THE CASE

This case questions the constitutionality of Sec. 5739.33 of the Ohio Revised Code which imposes personal liability upon officers and employees of a corporation which for any reason fails to pay sales tax on sales which it made.

The tax in question is sales tax not entirely collected by the corporation for goods sold by a corporation to building contractors which the State did not ultimately receive. Appellants contend that the statute is overly broad because

it creates a situation where officers and employees may not defend the imposition of the corporate liability for the tax on them. The state need show no wrong or misdeed nor allege any wrongdoing because R. C. 5739.33 does not require any showing of wrong and consequently there is no means for Appellants or others similarly situated to show reasons why the tax should not be imposed upon them.

Appellants believe that the state has a burden to show wrongdoing, fault or some other causal relationship to the fact that the state did not receive the tax. The statute and its related statutes provide for hearings before the Tax Commissioner and the Board of Taxation Appeals. However, these hearings are only for the purpose of establishing that the parties were officers of the corporation who were responsible for the day to day operations

of the company. Appellants did not deny that they were officers at all stages of the process, but have contended that R. C. 5739.33 is overly broad and violates the Fourteenth Amendment of the Constitution because it contains a factual conclusion that the class members are responsible for the corporate tax without giving class members the opportunity for meaningful hearing.

STATEMENT OF FACTS

This appeal is based on the unconstitutionality of Sec. 5739.33 of Ohio Revised Code and not the facts, however Appellants believe the background will be helpful to demonstrate the ills of the statute.

Appellants were officers of a corporation which sold approximately 90% of its building material to builders on open accounts. During the periods in question, numerous customers of the

corporation filed for relief under Chapter 7 of the United States Bankruptcy Code. Hundreds of thousands of dollars of goods and the sales taxes thereon were included in the open account billings much of which was not paid to the corporation.

Although the corporation had inventories of substantial value, its cash position was drastically impaired. The company was unable to pay all of the tax obligation to the State of Ohio, but was paying monthly under an informal agreement with the Taxation Department. During late 1979 and early 1980 the company had a dispute with its commercial lender over escalating interest rates the bank had sought to charge the company and other bad faith actions by the bank. Prior to the dispute all accounts with the bank were current. The company then refused to pay the disputed amounts. The

bank along with the United States Small Business Administration took possession of all assets of the company and sold them at approximately 15% of their cost without paying anything to the State of Ohio. This action took place under the Ohio Revised Code's Uniform Commercial Code section which allowed repossession and sale without court supervision or judgment. The matter went to trial after the sale and has been contested for several years. A jury has found that the company's complaint pertaining to the interest rate was well founded and determined that the bank had sought approximately $70,000.00 in improper interest charges from the company. The Franklin County Court of Appeals reversed a dismissal of the company's claim that the bank had not been commercially reasonable in its actions and had acted with bad faith. Unfortunately with its

assets sold at the small percentage of their value, the company could not continue to operate and has not conducted business since 1980.

THE PROCEEDINGS BELOW

Appellants were officers of the subject corporation at all stages of the process, but have contended that Sec. 5739.33 of the Ohio Revised Code is unconstitutional at each stage of the hearing process because the statute violates the Fourteenth Amendment of the Constitution.

The Tax Commissioner sought to impose personal liability by notice of intent to levy being issued upon Appellants. Hearings were then held in front of the Tax Commissioner and the Board of Tax Appeals who noted that they did not have jurisdiction to determine the constitutionality of R. C. 5739.33. Both returned findings that Appellants were officers under the statute who were

liable for the taxes and both noted in their opinions that facts other than whether Appellants were officers of the corporation defined by the statute were immaterial.

The adverse findings by the Tax Commissioner and the Board of Tax Appeal were then appealed to the Ohio Supreme Court which disposed of the constitutional issue without discussing Appellants' claim that the statute violated Appellants' rights to hearing, by simply stating that the statute was not void for vagueness, not overbroad and did not create an unconstitutional presumption. The court stated that Appellants had not cited any authority for their contention that R. C. 5739.33 is constitutionally infirm. Appellants cannot find any cases directly on point which would hold a taxing statute such as R.C. 5739.33 unconstitutional, however

several citations were contained in their arguments before the Ohio Supreme Court which were not discussed or apparently considered by the court in making its decision.

Appellants bring this matter before this Court upon as appeal of right under 28 U. S. Code sec. 1257 (2).

SUMMARY OF ARGUMENT

Narrow classification by the state of persons who will be personally liable for corporate tax obligations which does not reasonably identify a class and the imposition of strict liability wherein a factual conclusion of fault is made upon the class members without a meaningful hearing violates the Due Process and the Equal Protection requirements of the Fourteenth Amendment of the Constitution.

ARGUMENT

To begin with, the State of Ohio seeks to deprive Appellants of a fundamental right not a privilege. A person may not have his property taken from him without a hearing. Here the state seeks to take the property of Appellants to satisfy the obligation of another person, the corporation.

Ohio Revised Code Sec. 5739.33 provides in part as follows:

> If any corporation required to file returns and to remit tax due to the state..., fails for <u>any</u> reason to make such filing or payment, any of its officers, or employees having control or supervision of or charged with the responsibility of filing returns and making payments shall be personally liable for such failure.....The sum due for such liability may be collected by assessment in the manner provided in section 5739.13 of the Revised Code. (Emphasis added)

The State of Ohio therein creates a limited class of persons who will be

personally liable for the corporate tax. Presumably this class is designed to impose personal liability for the taxes in question on those people who failed in some way to abide by the mandates that the corporation collect and pay over certain taxes. To find otherwise would be to ignore one of the basic tenets of corporations, i.e. limited liability.

The class so created is not complete, for instance other persons or reasons than a breach of duty by members of this class may cause the failure of a corporation to pay over taxes, for instance a thief, embezzeler, non-paying customer, arsonist, over aggressive creditor with control over the funds of a corporation or a natural disaster. It is not Appellants' argument that personal liability should never be imposed upon negligent officers and employees of a defaulting corporation. Appellants

believe that the classification is irrational since it precludes so many other people who might be responsible and that the factual conclusion that this class has failed in some duty denies Appellants of their right to meaningful hearing on the matter of their fault.

Due process of law is not an easily defined term. In ascertaining what is due process courts generally resort to two sources: the Constitution itself and proceedings existing in the common and statutory law. As a general principle, every one is entitled to the protection of their fundamental liberty and justice. It is this principle which forms the basis of all of our civil and political institutions. Among the liberties protected by due process under the United States Constitution is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal

security. Vitek v. Jones, 445 U. S. 480, 492 (1980).

This Court has never sought to precisely define due process of law. A clear phrase specifying what proceedings do and do not constitute due process probably can never be defined since each case depends on the particular facts and their relation to the particular law. Thus the Court has sought to set minimum requirements of the guarantees of procedural and substantive due process taking into account the dual aspect of procedure and substance. This Court has held that a minimum requirement is that a procedure be afforded under which he whose property is to be taken be allowed to be heard; that the determination under which he is required to surrender his property be reasonable; and that the determination be free from the

opportunity for arbitrary power. Nebbia v. New York, 291 U. S. 502, 525 (1934).

Protection from arbitrary action is the essence of substantive due process. Not merely a procedural safeguard, due process reaches those situations where the deprivation of life, liberty and property is accomplished by legislation which preserves the fairest procedure. Poe v. Ullman, 367 U. S. 497, 541 (1961).

Webster defines arbitrary as "Fixed or arrived at through will or caprice; decisive but unreasoned;...". Appellants do not believe the legislature did not reason at all, they simply believe the reasoning was incomplete. Appellant Charles Ewing has become an attorney since this matter began and has seen many circumstances where members of the class of persons named by the State did indeed willfully fail to pay over taxes due to desperate circumstances, however he has

seen that the class is not complete and that there are other reasons why taxes are not paid including most of those listed above. The State makes no provision for similarly punishing the others listed above; it simply and arbitrarily punishes the officers and employees class.

Certainly a state has a legitimate interest in collecting taxes and Appellants believe that as long as citizens are given equal protection and the procedure is not arbitrary, unduly intrusive or overly broad, a state should be left alone to decide its particular means of collection. It is here that this Court is presented with the problem of determining if R. C. 5739.33 is fair and not unreasonably intrusive or arbitrary.

R. C. 5739.33 does not allow any defense or showing of excuse by a member

of the class of officers and employees defined by the statute. The statute says the officers and employees are liable if the corporation fails to file or pay for any reason. It is here that the statute is overly broad. A simple requirement of willfulness would keep the state from sweeping too broadly in its zeal to satisfy its need to collect taxes.

The Ohio Supreme Court has shown its vigor in enforcing the factual conclusiveness of R. C. 5739.33 in the case of Willis v. Lindley, 61 Ohio St. 2d 356 (1980). There Willis was the President and General Manager of a corporation which had been making deposits of its collected sales tax into a cash collateral account with its lender. The lender along with the United States Small Business Administration called the loan and decided not to pay the collected sales tax to the State of

Ohio. The Tax Commissioner then sought to impose personal liability on Willis under R. C. 5739.33. The Board of Tax Appeals found that Willis did not have control during the period that the bank had controlled the funds. The Ohio Supreme Court reversed, holding that the statutory language was plain that Willis was the officer charged with control or supervision or had the responsibility of filing returns and making payments and the fact that the bank had converted the funds in the supervised account did not alter Willis's liability under the language of R. C. 5739.33. The court did not address the issue of whether the statute was constitutionally infirm, but Justice Holmes in his dissent noted that the bank had made the determination of which creditors to pay which excluded the State for its sales tax due. Justice Holmes went on to say apparently on the

basis of fairness since he cited no authority, that

> "...absent a showing that appellee (Willis) had designed such an arrangement to avoid payment of the sales tax, or that he had some continuing control as to which creditors were in fact paid from these funds held by the bank, the individual taxpayer should not be held responsible pursuant to R. C. 5739.33." at 358.

R. C. 5739.33 seeks to impose a "no fault" liability upon a class of citizens, the officers and employees so defined, to pay the tax obligations of another no matter what the reason the corporation did not pay. Whether they are at fault or not, this class of people must pay the obligation under the state's scheme. The state seeks to gratify its need to collect taxes at the cost of a possibly innocent class of people. The scheme allows not even the simplest of safeguards to determine whether members of the class should be liable or not.

Section 6672 (a) of the Internal Revenue Code provides an example of a reasonably drawn statute which does not limit itself to a narrow class and by allowing the accused class member to show he is not at fault:

> Section. 6672. Failure to collect and pay over tax, or attempt to evade or defeat tax.
>
> (a) General rule.-Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall in addition to other penalties provided by law, be liable to a penalty equal to the total amount or the tax evaded, or not collected,or not accounted for and paid over. ... (emphasis added)

The Internal Revenue Code does not discriminate, it applies to any person, not a limited class. The statute also places a rational basis for imposing the

penalty, i.e. responsibility and willfulness.

The Court has addressed similar issues in Bell v. Burson, 402 U. S. 535 (1970). There the state sought to suspend driving privileges and motor vehicle registration on the basis of an accident, if the party was uninsured, irregardless of fault unless he posted security to cover the amount of damages. An administrative hearing was held, but the driver was not allowed to present evidence that he was not at fault. The Georgia Superior Court then held a hearing and determined that the driver was not at fault and ordered that the license not be suspended until suit was filed for the purposes of recovering damages. The Georgia Court of Appeals in overruling the Superior Court held that fault or innocence were completely irrelevant factors under the statutory

scheme. The Georgia Supreme Court denied review. This Court struck down the statute on the basis that it did not apply equally to all persons and did not provide a reasonable hearing on the basic issue of fault.

The Court then turned to a procedural due process analysis. Noting that the main thrust of Georgia's argument was that it need not provide a hearing on liability because fault and liability were irrelevant to the statutory scheme, the Court quoted from previous cases and commented that the Court must look to substance not bare form in reviewing state actions. The hearing required by the Due Process Clause must be meaningful and appropriate to the case. The Court concluded that the state had a wide choice of suitable alternative procedures which would not

deny the petitioner procedural due process under the Fourteenth Amendment.

The Court has also addressed the issue of a state interest being protected by arbitrary classifications and conclusive presumptions in Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974). There the state sought to preserve its continuity of instruction by imposing mandatory maternity leave five months before the expected due date of a baby. Although recognizing that the state's objective of continuity and acknowledging that advance notice was reasonable, the arbitrary setting of a five month cutoff date was not. In discussing the choice of the beginning of a certain month as a cutoff date the Court reasoned that some of the affected teachers would indeed be incapacitated at that time but noted that there was no individualized testing as to her ability

to continue her job and held that the rules swept too broadly. The Court then reaffirmed the proposition that some conclusive presumptions are violative of the Due Process Clause, when they are neither "necessarily [nor] universally true". supra at 646. Justice Powell noted in his concurring opinion his and Justice Rehnquist's concern with "irrebuttable presumptions" and commented that conclusions regarding such conclusive presumptions should be approached with extreme care. Instead Justice Powell reasoned that the Board had made an irrational classification.

It is Appellants' position that Ohio's scheme to collect its taxes from the limited class of officers and employees and the failure to allow any rebuttal of its factual conclusion that members of this class are universally guilty of some wrongdoing which would

justify the imposition of personal liability upon them is both an irrational classification and has swept too broadly in holding this class of persons strictly liable. The class should include all persons, no matter where they are situated, and those members of the class should have the right to introduce evidence to show they are not at fault and why they should not be penalized.

Therefore, based upon the case law and the Constitution, R. C. 5739.33 which defines an arbitrary and unreasoned class of persons and provides no opportunity for members of the class to defend the presumption made by the statute denies appellant and others similarly situated due process and equal protection under the Fourteenth Amendment.

CERTIFICATE OF SERVICE

I do hereby certify that I served the above document by regular mail, postage prepaid, on all parties as listed below this 19th day of September, 1986.

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